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Governor's Tracking No. AR 419

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE RACING COMMISSION

In the Matter of the Proposed Rules of the State Racing Commission Regarding Horse Racing Fees (Minn. R. 7877.0120), Licensing of Security Officers (Minn. R. 7878.0120), Postmortem Examination (Minn. R. 7891.0110), Taking of Samples (Minn. R. 7892.0120), and Standardbred Registration (Minn. R. 7895.0275)

REPORT OF THE ADMINISTRATIVE LAW JUDGE

Administrative Law Judge Beverly Jones Heydinger conducted a hearing concerning the above rules beginning at 1:00 p.m. on December 19, 2008, in the Paddock Gardens Conference Room, Canterbury Park, 1100 Canterbury Road, Shakopee, Minnesota. The hearing continued until all interested persons, groups, and associations had an opportunity to be heard concerning the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.[1] The legislature has designed the rulemaking process to ensure that state agencies have met all of the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable, that they are within the agency's statutory authority, and that any modifications that the agency may have made after the proposed rules were initially published are not impermissible substantial changes.

The rulemaking process includes a hearing when a sufficient number of persons request that a hearing be held. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. The Administrative Law Judge is employed by the Office of Administrative Hearings (OAH), an agency independent of the Racing Commission.

Richard Krueger, Executive Director; Mary Manney, Deputy Director; and Dr. Lynn Hovda, Chief Commission Veterinarian, appeared at the rule hearing on behalf of the Racing Commission (Commission or Agency). Thirteen members of the public signed the hearing register, and six members of the public spoke at the hearing.

The Commission received written comments on the proposed rules before the hearing. After the hearing, the record remained open for twenty days, until January 8, 2009, to allow interested persons and the Commission an opportunity to submit written comments. Following the initial comment period, the record remained open for an

[1] Minn. Stat. §§ 14.131 through 14.20 (2008).

additional five working days to allow interested persons and the Commission the opportunity to file a written response to the comments submitted. The OAH hearing record closed on January 15, 2009. Aside from the Commission's post-hearing submission, no comments were received during the post-hearing comment periods.

SUMMARY OF CONCLUSIONS

The Commission has established that it has the statutory authority to adopt the proposed rules and that the rules are necessary and reasonable.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Nature of the Proposed Rules

1. This rulemaking involves limited parts of Minnesota Rules chapters 7877 (Class C Licenses); 7878 (Security Officers); 7891 (Horse Examinations); 7892 (Medical Testing); and 7895 (Breeders' Fund).

2. Specifically in this rulemaking proceeding, the Commission is proposing to increase the license fees for the occupation classification "Owner/Trainer/Rider" to a level that is more consistent with the combined fees associated with those individual occupation classifications. Second, the Commission proposes to identify the University of Minnesota Veterinary Diagnostic Laboratory as the laboratory that will conduct all post-mortem examinations of horses that expire while stabled at a licensed racetrack.[2]

3. Third, the proposed rules state, in a slightly revised manner, that blood and urine testing of horses can be ordered by the stewards at any time while horses are on the grounds of licensed racetracks. Fourth, the Commission proposes regulatory guidelines for split sample testing for total dissolved carbon dioxide (TCO_2), which is the bicarbonate level of a horse caused by the administration of alkalinizing agents. This is known as "milkshaking" in the horseracing industry. Finally, the Commission proposes a late fee schedule for late registration of standardbred foals.[3]

4. These rules reflect the most current recommendations from the Racing Medication and Testing Consortium (RMTC) and, according to the Commission, are similar to rules adopted by most racing jurisdictions throughout the United States. The RMTC consists of 24 groups including the National Horsemen's Benevolent and Protective Association (HBPA), the Jockey Club, the Jockey's Guild, the Association of Racing Commissioners International (ARCI), the Thoroughbred Owner's and Breeder's Association (TOBA), the Harness Tracks of America, and the National Thoroughbred Racing Association (NTRA).[4]

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[2] Statement of Need and Reasonableness (SONAR) at 1.
[3] SONAR at 1.
[4] Minnesota Racing Commission Responsive Comments (Commission Response), dated January 13, 2009.

5. Since 2001, the RMTC has developed a set of model rules for horse racing in the United States and Canada. Each racing jurisdiction is encouraged to adopt the model rules. Canterbury Park has signed and agreed to abide by the Safety and Integrity Alliance Pledge of the NTRA. According to the Commission, the NTRA has mandated the proposed rules.

6. The Commission began developing these proposed rules in November 2007, and has continued to provide updates on the status of the rulemaking at its monthly meetings. More specifically, the Commission addressed these proposed rules at its November 8, 2007, May 6, 2008, May 15, 2008, and June 10, 2008 meetings.[5]

Rulemaking Legal Standards

7. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, a determination must be made in a rulemaking proceeding as to whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.[6] The Commission prepared a Statement of Need and Reasonableness (SONAR) in support of the proposed rules. At the hearing, the Commission primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed rule. The SONAR was supplemented by comments made by Commission representatives at the public hearing and in a written post-hearing submission.

8. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.[7] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.[8] A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.[9]

9. The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[10] An agency is entitled to make choices between possible approaches as long as the choice made is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach because this would

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[5] SONAR at 5.
[6] *Mammenga v. Department of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).
[7] *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).
[8] *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).
[9] *Mammenga*, 442 N.W.2d at 789-90; *Broen Memorial Home v. Department of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).
[10] *Manufactured Housing Institute*, 347 N.W.2d at 244.

invade the policy-making discretion of the agency. The question is rather whether the choice made by the agency is one that a rational person could have made.[11]

10. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the agency complied with the rule adoption procedures; whether the rule grants undue discretion; whether the Commission has statutory authority to adopt the rule; whether the rule is unconstitutional or illegal; whether the rule constitutes an undue delegation of authority to another entity; or whether the proposed language is not a rule.[12]

Procedural Requirements of Chapter 14

11. On June 2, 2008, the Commission published a Request for Comments on the proposed rules. The Request for Comments was published at 32 S.R. 2154.

12. By letter dated October 13, 2008, the Commission requested that the Office of Administrative Hearings schedule a hearing and assign an Administrative Law Judge. Along with the letter, the Commission filed a proposed Dual Notice of Intent to Adopt Rules without a Public Hearing and Notice of Hearing if 25 or More Requests for Hearing are Received, a copy of the proposed rules, and a draft of the SONAR. The Commission also requested that the Office of Administrative Hearings give prior approval of its Additional Notice Plan.

13. On October 20, 2008, the Commission submitted a revised Dual Notice to OAH.

14. In a letter dated October 22, 2008, Administrative Law Judge Beverly Jones Heydinger approved the Commission's Dual Notice and Additional Notice Plan.

15. On October 27, 2008, the Commission mailed a copy of the SONAR to the Legislative Reference Library as required by Minn. Stat. § 14.23.

16. On October 28, 2008, the Commission mailed copies of the Dual Notice, proposed rules, and SONAR to the chairs, chief authors, and ranking minority members of designated legislative committees.[13]

17. Also on October 28, 2008, the Commission mailed the Dual Notice to all persons and associations who had registered their names with the agency for purpose of receiving such notice and to all persons identified in the Additional Notice Plan.

18. Due to a miscommunication between the Commission and the State Register staff, the Dual Notice was not published on November 3, 2008, as planned. The Commission amended the end date of the comment period accordingly, submitted the amended Dual Notice to OAH, and the State Register published the Dual Notice on November 10, 2008.

19. On November 5, 2008, the Commission mailed copies of the revised Dual Notice, proposed rules, and SONAR to the chairs, chief authors, and ranking minority members of designated legislative committees. On that day, the Commission also

[11] *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).
[12] Minn. R. 1400.2100.
[13] *See* Minn. Stat. § 14.116.

mailed the revised Dual Notice to all persons and associations who had registered their names with the agency for purpose of receiving such notice and to all persons identified in the Additional Notice Plan.

20. On November 10, 2008, a copy of the proposed rules and Dual Notice were published in the State Register at 33 S.R. 803.

21. On the day of the hearing the following documents were placed in the record:

- The Request for Comments on Possible Amendment to Rules Governing Horse Racing, published June 2, 2008, at 32 SR 2154;
- A copy of the proposed rule with Revisor's approval dated September 8, 2008;
- A copy of the SONAR;
- Copy of letter from Administrative Law Judge dated October 22, 2008, approving Dual Notice and Additional Notice Plan;
- Certificate of Mailing the SONAR to the Legislative Reference Library, with cover letter dated October 28, 2008;
- Certificate of Accuracy of the Mailing List and E-mail List, with mailing list;
- Certificate of Mailing and E-Mailing the Dual Notice and a Copy of the Proposed Rules to the Rulemaking Mailing List on October 28, 2008, with mailing list**;**
- Certificate of Giving Additional Notice pursuant to the Additional Notice Plan on October 28, 2008, with mailing list;
- Certificate of Sending the Notice and the SONAR to Legislators, with cover letter dated October 28, 2008;
- Certificate of Mailing and E-Mailing the Dual Notice and a Copy of the Proposed Rules to the Rulemaking Mailing List on November 5, 2008, with mailing list**;**
- Certificate of Giving Additional Notice pursuant to the Additional Notice Plan on November 5, 2008, with mailing list;
- Certificate of Sending the Notice and the SONAR to Legislators, with memo dated November 5, 2008;
- A copy of the Dual Notice and Proposed Rules as mailed and as published November 10, 2008, at 33 S.R. 803;
- Public comments received before the hearing and requests for a hearing;
- Certificate of Mailing a Notice of Hearing to Those Who Requested a Hearing;
- Categorization of comments by the Commission (Ex. 1);

- Association of Racing Commissioners International (ARCI) Model Rules relating to testing, page 195 (Ex. 2); and
- McIntosh Comments on False Positive (Ex. 3).

22. The Commission's post-hearing response, dated January 13, 2009, was also placed into the rulemaking record.

Additional Notice

23. Minnesota Statutes §§ 14.131 and 14.23, require that the SONAR contain a description of the Commission's efforts to provide additional notice to persons who may be affected by the proposed rules. The Commission submitted an additional notice plan to the Office of Administrative Hearings, which reviewed and approved it by letter dated October 22, 2008. In addition to notifying those persons on the Commission's rulemaking list, the Commission represented that it would also request that the following groups put notice of the rulemaking in their respective newsletters: Minnesota Harness Racing, Inc.; Minnesota Thoroughbred Association; Arabian Racing Association of Minnesota; Horsemen's Benevolent and Protective Association; and Minnesota Quarter Horse Racing Association.[14]

24. A copy of the proposed rules and Dual Notice were also posted on the Commission's web site.[15]

25. The Administrative Law Judge finds that the Commission fulfilled its additional notice requirement.

Statutory Authorization

26. The Commission has general statutory authority to adopt the proposed rules. Minn. Stat. § 240.23 provides:

> The Commission has the authority, in addition to all other rulemaking authority granted elsewhere in this chapter to promulgate rules governing a) the conduct of horse races held at licensed racetracks in Minnesota, including but not limited to the rules of racing, standards of entry, operation of claiming races, filing and handling of objections, carrying of weights, and declaration of official results, b) wire communication between the premises of a licensed racetrack and any place outside the premises, c) information on horse races which is sold on the premises of a licensed racetrack, d) liability insurance which it may require of all racetrack licensees, e) auditing of the books and records of a licensee by an auditor employed or appointed by the Commission, f) emergency action plans maintained by licensed racetracks and their periodic review, g) safety, security, and sanitation of stabling facilities at licensed racetracks, h) entry fees and other funds received by a licensee in the course of conducting racing which the Commission determines must be placed in an escrow

[14] SONAR at 5.
[15] SONAR at 5.

account, i) affirmative action in employment and contracting by licensed racetracks, and j) any other aspect of horse racing or pari-mutuel betting which in its opinion affects the integrity of racing or the public health, welfare, or safety.

27. The Administrative Law Judge finds that the Racing Commission has the statutory authority to adopt the proposed rules.

Regulatory Analysis in the SONAR

28. The Administrative Procedure Act requires an agency adopting rules to consider seven factors in its Statement of Need and Reasonableness. The first factor requires:

> **(1) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.**

The Commission lists the following classes of persons as those who will be primarily affected by the proposed rules: Class C licensees for the occupations of pari-mutuel clerk, owner/trainer/driver, and security officer; licensed horsemen and women; jockeys; trainers; breeders of standardbred foals; and the wagering public.[16]

Those classes that will bear the costs of the proposed rules are Class C licensees for the occupations of pari-mutuel clerk, owner/trainer/driver, and security officer; and late registrants of standardbred foals. Those who will benefit from the proposed rules are the wagering public, and jockeys, trainers, drivers, and owners.[17]

> **(2) The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.**

The Commission does not anticipate that the proposed rule amendments will increase its costs, or the costs to any other state or local agency, to implement and enforce the rules. According to the Commission, state special revenue funds are estimated to increase by approximately $4,000 due to the occupational licensing amendments.[18]

> **(3) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.**

[16] SONAR at 2.
[17] SONAR at 2.
[18] SONAR at 2.

(4) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

The Commission states that the proposed rule amendments regarding occupational categories and license fees are simply reclassifying some of the occupational categories set in place in previous rulemakings and charging a higher fee. The Commission asserts that the fee increase is necessary to make the fees similar to other occupational categories.[19]

The Commission did not consider any alternatives regarding the proposed requirement that postmortem examinations be conducted at the University of Minnesota Veterinary Diagnostic Laboratory because the Commission has been using the University exclusively for this purpose since 1985. The Commission also supports using the University's veterinary laboratory because it is a teaching facility.[20]

As for the taking of samples at any time horses are present on licensed facilities and adding the option of requesting a split sample test, the Commission did not consider any alternatives. The Commission argues that these changes are necessary to strengthen its oversight of Minnesota racing.

Finally, the Commission argues that it is proposing a less intrusive and potentially less costly method to accomplish the registration of a standardbred foal by imposing a standard late fee rather than requiring an applicant to go through a lengthy variance process.[21]

(5) The probable costs of complying with the proposed rules, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

The Commission maintains that costs will be assessed to those licensees affected by the proposed license fee increases, in the amount of approximately $4,000, with the maximum individual license increase being $70. The cost of testing of samples will be the responsibility of the racetracks, and the cost of split sample testing and late fees for standardbred foal registration will be borne by horse trainers and owners. The Commission states that no governmental units will be affected.[22]

(6) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.

According to the Commission, the costs or consequences of not adopting these proposed rules is lost revenue to the State to defray the costs of regulation; reduced

[19] SONAR at 2-3.
[20] SONAR at 3.
[21] SONAR at 3. *See* Minn. R. 7899.0100.
[22] SONAR at 3.

regulatory oversight that protects the integrity of this type of legalized gambling; increased disputes over TCO_2 samples, thereby compromising the Commission's oversight of "milkshaking;" and inconsistency between the late registration fees charged for standardbred foals and the fees charges for standardbred stallions and other breeds.[23]

(7) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.

The Commission stated that there are no differences between these rules and existing federal regulations.

Performance-Based Rules

29. The Administrative Procedure Act[24] also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.[25]

30. The Commission's mission statement is as follows:

> The Minnesota Racing Commission was established to regulate horse racing and card playing in Minnesota to ensure that it is conducted in the public interest, and to take all necessary steps in ensuring the integrity of racing and card playing in Minnesota thus promoting the breeding of race horses in order to stimulate agriculture and rural agribusiness.

31. These proposed rules are meant to strengthen the Commission's statutorily-authorized regulatory oversight so as to ensure the continued integrity of this form of legalized gambling. The Commission states that it is constantly striving to improve the integrity of racing and pari-mutuel wagering while at the same time allowing flexibility for the regulated parties.[26]

Consultation with the Commissioner of Finance

32. Under Minn. Stat. § 14.131, the Agency is also required to "consult with the commissioner of finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government."

33. The Commission consulted with the Department of Finance on September 2, 2008, by sending the Department copies of the documents sent to the Governor's Office for review. In a response dated September 4, 2008, the Department of Finance

[23] SONAR at 3-4.
[24] Minn. Stat. § 14.131.
[25] Minn. Stat. § 14.002.
[26] SONAR at 4-5.

concluded that the proposed rule revisions "will have no fiscal impact on local units of government."[27]

34. The Administrative Law Judge finds that the Commission has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

Compliance Costs to Small Businesses and Cities

35. Under Minn. Stat. § 14.127, the Commission must "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees."[28] The Commission must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[29]

36. The Commission has determined that the cost of complying with the proposed rule in the first year after it takes effect will not exceed $25,000 for any one small business or small city. According to the Commission, the proposed amendments affect only individuals working at a racetrack or owners desiring to register a standardbred foal.[30] The Administrative Law Judge notes that a small business employing a number of individuals who must be licensed could also be affected, but it is improbable that those costs would approach $25,000.

37. The Administrative Law Judge finds that the Agency has made the determination required by Minn. Stat. § 14.127 and approves that determination.

Analysis of the Proposed Rules

General

38. This report is limited to discussion of the portions of the proposed rules that received significant comment or otherwise need to be examined. When rules are adequately supported by the SONAR or the Commission's oral or written comments, a detailed discussion of the proposed rules is unnecessary. The Agency has demonstrated the need for and reasonableness of all rule provisions not specifically discussed in this report by an affirmative presentation of facts. All provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

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[27] SONAR at 5-6; Office Memorandum from Abigail Read, Executive Budget Officer, dated September 4, 2008.
[28] Minn. Stat. § 14.127, subd. 1.
[29] Minn. Stat. § 14.127, subd. 2.
[30] SONAR at 6.

Discussion of Proposed Rules

Part 7891.0110, subpart 1

39. Under the current rule, horses that expire or are euthanized while under the jurisdiction of the Commission must undergo a postmortem examination conducted by the "commission veterinarian or the veterinarian's designee." The Commission proposes to amend subpart 1 of part 7891.0110 to require that the postmortem examinations be conducted by the University of Minnesota Veterinary Diagnostic Laboratory.

40. The Commission asserts that it is reasonable to amend this rule part as proposed because the University's Veterinary Diagnostic Laboratory has been performing all of the Commission's postmortem examinations for the last ten years. Furthermore, the Commission argues that the University is physically better equipped than the Commission veterinarian to do these examinations, has board certified pathologists to perform the examinations, and rapidly provides the Commission's Chief Veterinarian with comprehensive written results. The Commission believes that the speed of the University's results helps prevent the spread of communicable infectious diseases and can prevent injuries in other racehorses.[31] According to the Commission, given current circumstances, the effect of the proposed rule part will be no different than the effect of the current rule.

41. Several public commentators objected to this proposed change. One objection was to designating a sole vendor for the postmortem examination, thereby eliminating competition in the market.[32] Cort Holten of the Minnesota Horsemen's Benevolent and Protective Association (HBPA) argued that if the effect of the proposed rules is no different than the effect of the current rules, then the proposed rule must not be necessary or reasonable. Mr. Holten did not object to the University performing postmortem examinations, but worried what would happen if the University decided to no longer perform these services or to substantially increase its fees for postmortem exams.[33] Pete Mattson, also with HBPA, suggested that the Commission amend this rule part to include a competitive bidding and pricing procedure for postmortem examinations.[34]

42. Daniel Mjolsness races horses and also voiced an objection to this proposed rule part. He questioned whether postmortem examinations were absolutely necessary because horse owners, upon the death of a horse, already experience enough sadness, disappointment, and loss of an income-producing asset. Mr. Mjolsness also asserted that whoever initiates the postmortem examination should be required to pay for it.[35]

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[31] SONAR at 7.
[32] Transcript (T.) at 30-31 (Testimony of Cort Holten), 66-67 (Testimony of John Walsh).
[33] T. at 30-31.
[34] T. at 78-79.
[35] T. at 36-37.

43. Both during and after the hearing, the Commission expanded upon its reasoning for the proposed change with six points. First, the Commission asserts that it is less expensive to send these horses for a complete postmortem examination at the University than to have a renderer pick up and dispose of the horse. Second, the Commission argues that because the University of Minnesota Veterinary Diagnostic Laboratory is staffed by board certified pathologists who provide written results of the examinations to the Commission veterinarians, insurance companies will have confidence in the Laboratory's reports and conclusions. Third, and most importantly in the Commission's view, the University's manner of disposing of the horse carcasses after the postmortem examination assures that the remains are kept out of the human and animal food chain. Fourth, the Commission asserts that the speed at which the University provides information to the Commission regarding infectious diseases helps the Commission to quickly convey that information to the Minnesota Board of Animal Health to help prevent the spread of infectious diseases. Fifth, the University uses state-of-the-art tools, equipment, and personal protection to perform these examinations, thereby protecting the individual performing the exam and helping to curb the spread of disease. And finally, the University uses these examinations to educate veterinary students who complete rotations in the Diagnostic Laboratory. [36]

44. The Administrative Law Judge finds that the Commission has shown a rational basis in the record for this proposed change to subpart 1. While the objections to the proposed rule part suggesting it is anti-competitive are valid and thoughtful, they do not establish that the Commission's choice is irrational. As pointed out above, the Commission already uses the University's Veterinary Diagnostic Laboratory for all of its postmortem examinations and the Commission wishes to memorialize its current standard practice in its rules. The Administrative Law Judge finds that this amendment to subpart 1 is needed and reasonable.

Part 7892.0120, subpart 1, item B

45. This rule part deals with the taking of samples from horses and which horses will be tested. The Commission proposes to amend subpart 1, item B as follows:

> Blood and/or urine test samples may be taken from randomly selected horses ~~during each racing program, from horses~~ designated by the stewards or the commission veterinarian at any time upon suspicion that a violation of chapter 7890 has occurred~~, or for testing the quantitative levels of furosemide in the plasma or urine and the level of urine creatinine of treated horses~~.

46. The Commission states that it is reasonable to amend this rule because the specified laboratory tests are outdated and no longer performed. As to the elimination of the "during each racing program" language, the Commission asserts that testing during each racing program is already covered in subpart 1, item A, which states that "blood and/or urine test samples shall be taken from at least two horses, one of

[36] Commission Response dated January 13, 2009. T. at 42-46 and 75-78.

which must be the winning horse in every race."[37] Its intent was to expand the testing to all horses on track grounds.

47. Of the proposed changes, this proposal generated the most controversy among the regulated parties. One person commented that this particular proposed amendment, if enacted, would drastically change the way the racing industry functions.[38] Currently, horses that are present on track grounds, but are not "in competition" are not subject to "anytime" testing. Horse owners and trainers know that if their horses are "out-of-competition" while on Commission grounds, the horses are not in jeopardy of being tested. Under the proposed rule, "out-of-competition" horses would be subject to random testing "upon suspicion that a violation of chapter 7890 has occurred."

48. Cort Holten and Daniel Mjolsness argued that this new standard is unfair because often times "out-of-competition" horses on Commission grounds are being treated for any number of maladies by various antibiotics or treatments so that the animal can be made healthy enough to race. Testing horses when they are "out-of-competition" not only increases the number of tests being done, but also increases the number of possible false positives, which can damage the reputation of an owner or trainer.[39]

49. Nearly all of the commentators objected to the "upon suspicion" standard, arguing that it is arbitrary and capricious and really no standard at all. Several people commented that they feared that the results of "out-of-competition" testing could put owners, trainers, and horses out of business based upon a standard that is arbitrary in nature. These individuals argued that the "upon suspicion" standard may not be applied uniformly by the Commission.[40]

50. Patrice Underwood, Executive Director of the HBPA, suggested that the Commission's reasoning for being able to test horses "anytime" was not reasonable. She stated that there are other rule provisions currently in effect that help the Commission to discover medication violations in horses. For example, Minn. R. 7891.0100 requires a racing soundness examination; Minn. R. 7890.0120, subp. 1 requires veterinarians to turn in daily reports to the Commission veterinarian regarding a racing horse's health and medications; and Minn. R. 7890.0110 specifically lists prohibited practices and medications.[41]

51. Cort Holten and John Walsh also asserted that this proposed revision to the rules was beyond the Commission's cited statutory authority, Minn. Stat. § 240.23, because the statute makes no mention of horse medications. They argue instead that a more specific statute, Minn. Stat. § 240.24, governs the proposed change to subpart 1, item B.[42] Minn. Stat. § 240.24 provides:

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[37] SONAR at 7.
[38] T. at 19.
[39] T. at 21-24, 37.
[40] T. at 20-21, 25-27, 32, 63-64, 73-74, and 80-82.
[41] T. at 48-51.
[42] T. at 24-25, 62-64.

> The commission shall make and enforce rules governing medication and medical testing for horses running at licensed racetracks. The rules must provide that no medication, as the commission defines that term by rule, may be administered to a horse within 48 hours of a race it runs at a licensed racetrack. The rules must also provide that no horse participating in a race shall carry in its body any substance foreign to the natural horse. The commission shall by rule establish the qualifications for laboratories used by it as testing laboratories to enforce its rules under this section.

52. Mr. Holten notes that Minn. Stat. § 240.24 relates only to competing horses and not horses that are "out-of-competition." He argues that this proposed change to subpart 1, item B is unnecessary and goes beyond what the legislature intended when it drafted the rule-authorizing statute.[43]

53. In response to these concerns, the Commission reiterated and expanded upon the arguments set forth in the SONAR. The Commission asserted that the proposed change brings it into compliance with the Association of Racing Commissioners International (ARCI) model rule for "Out-of-Competition" testing. Additionally, the proposed language allows the Commission veterinarian to take samples from horses working to be removed from the veterinarian's list, as required by rule,[44] without depending on Minn. R. 7892.0120, subpart 6.[45]

54. At the hearing, the Commission Veterinarian Lynn Hovda cited four situations in which "out-of-competition" testing would be used: first, to detect blood doping through the use of Erythropoietin (EPO), Darviton, Darbepoietin, Oxyglobin, and Hemopure, which ultimately protects the safety of the horse and protects the betting public by providing a level playing field;[46] second, to assist Commission investigators with suspected medication violations (i.e. use of snake venom); third, to test harness racing horses prior to running in qualifying races; and fourth, to aid in removing horses from the veterinarian's list, which requires the listed horses to meet race day medication requirements.[47]

55. The Commission stressed that its veterinarians and stewards would apply the proposed rule with a great deal of conscientiousness and care.[48] In addition, the Commission noted that there would be no extra cost for veterinarians and a minimal increase in laboratory costs. For example, in 2008, the Commission sampled only six horses working to be removed from the veterinarian's list.

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[43] T. at 25 and 27.

[44] The "veterinarian's list" means the tabulation of horses required to be maintained by part 7877.0175, subpart 8. Minn. R. 7890.0100, subp. 21. Horses on this list have been scratched from a race because of illness or injury, pulled up because of lameness or other injury during a race, categorized as "bleeders," or otherwise considered unfit to race in the professional judgment of the Commission veterinarian.

[45] Commission Response dated January 13, 2009. Subpart 6, Other Materials, allows the stewards or Commission veterinarian to take a sample of any material on association grounds if there is reason to believe that material contains a substance which has been used or will be used in violation of chapter 7890.

[46] *See* Minn. R. 7890.0110, subp. 4.

[47] T. at 38-41.

[48] T. at 34.

56. As to the statutory authority objections, the Commission pointed to item J of Minn. Stat. § 240.23, which allows the Commission, in addition to all other rulemaking authority granted elsewhere, to make rules governing "any other aspect of horse racing . . . which in its opinion affects the integrity of racing or the public health, welfare, or safety."[49] The Commission believes that expanding the scope of testing to "out-of-competition" horses enhances the integrity of racing. The rulemaking authority granted in Minn. Stat. § 240.24 addresses testing of horses within 48 hours of a race but does not limit testing outside that time period.

57. Finally, as further support, the Commission pointed out that many of the RMTC Board Members, as well as the NTRA Safety and Integrity Alliance Task Force require "out-of-competition" testing.[50] The Commission cited the ARCI model rules, which state in relevant part: "Random or extra testing may be required by the stewards or the Commission at any time on any horse on association grounds."[51]

58. The Administrative Law Judge finds that the Commission has demonstrated a rational basis for the proposed changes to subpart 1, item B. The Administrative Law Judge notes the thoughtful objections to the "anytime upon suspicion" language. While the changes to this subpart expand the application of the "anytime upon suspicion" language to horses that are "out-of-competition," the Commission is still permitted to apply that standard to horses on association grounds.

59. The general statutory authority of Minn. Stat. § 240.23, item J is broad enough to encompass the proposed change to this subpart and applies to the overall health and integrity of the horse, regardless of its racing status. In fact, the Commission's proposed language is inconsistent with Minn. Stat. § 240.24, which addresses the administration of medication to a horse within 48 hours of race time. It is not unreasonable for the Commission to have the ability to test horses on track grounds, regardless of whether the horses are racing.

60. The Commission may wish to respond to the concerns of the commentators by adding a sentence to subpart 1 that requires test results to note whether the tested horse was "out-of-competition" at the time of the test. Such a change is needed and reasonable and would not make subpart 1 substantially different from the rules as originally published in the State Register.

Part 7892.0120, subpart 5a

61. Subpart 5a is new language dealing with split sample testing for total dissolved carbon dioxide (TCO_2):[52]

[49] T. at 69. *See*, pp. 6-7 of this Report for the complete text of Minn. Stat. § 240.23.
[50] Commission Response dated January 13, 2009.
[51] Ex. 2.
[52] The total concentration of all forms of carbon dioxide in the sample includes bicarbonate and carbonate as well as dissolved CO_2. The TCO_2 of the plasma or serum is used for regulatory purposes. The dissolved carbon dioxide is only a small fraction (about 3%) of the total carbon dioxide. *See* Commission Response dated January 13, 2009, attachment entitled "Recommended 'Best Practices' for TCO_2 Testing and Sample Collection."

A. Provisions for split sample testing shall be made prior to or at the time of the taking of the original sample.

B. The trainer or designee is responsible for requesting a split sample prior to or at the time of the original sampling and for arranging payment.

C. The sample shall be sent to the Minnesota Racing Commission contract laboratory as a separate and blinded sample.

D. No further provisions for split sample testing shall be available.

62. The Commission states that it is necessary and reasonable to add this subpart to provide a clear and concise method for trainers to request split sample testing for TCO_2 analysis. In addition, the change is required because TCO_2 is stable in blood samples for only five days and the split sample needs to be requested at the time of the original sample.[53]

63. Several commentators expressed their support for the proposed subpart but worried that, in practice, the protections sought to be provided by the rule would not be genuinely available. Because the split sample testing must be requested by the trainer and completed prior to, or at the time of, the taking of the original sample, and because the trainer or his designee is not always present at the time of the original taking of the sample, Mr. Holten argued that trainers will be deprived of their right to make this request. In many cases, by the time a trainer finds out that a sample was taken, it will be too late to request a split sample.[54]

64. Mr. Mjolsness believes that the proposed subpart will increase the risk of errors, create communication issues, and potentially increase costs to both horse owners and the Commission.[55] Patrice Underwood suggested that the Commission add language to the proposed rule to clarify the procedure. For instance, she asserted that the Texas racing authority requires that a written request for split sample testing be made at the testing barn no later than 30 minutes after the last post time, which gives the trainer time to complete other duties on race day before arranging (and submitting payment for) the split sample. Ms. Underwood also discussed different procedures she asserted are used in New York (pre-race and post-race testing, if necessary) and Kentucky (pre-race testing where enough blood is taken to accommodate a split sample if one is later requested).[56]

65. John Walsh reiterated that many of the individuals working "on the backside" of racing facilities are Hispanic and do not speak English. He questioned whether these workers would have the ability to timely request a split sample test. Mr. Walsh also indicated that he did not agree with the requirement that the split sample be sent to the Commission's laboratory.[57]

66. As further explanation for its proposed subpart 5, the Commission pointed out that the proposed language is substantially similar to current rule language at Minn.

[53] SONAR at 7.
[54] T. at 29-30.
[55] T. at 37-38.
[56] T. at 47-48.
[57] T. at 65-66.

R. 7890.0110, subpart 7, item E, and that the proposed language was added in chapter 7892 at the request of the Chair of the Commission to provide greater clarity. In response to the criticisms voiced at the hearing, the Commission stated that trainers are well-advised of TCO_2 testing, both verbally and in writing, by their personal veterinarians and through the "backside" PA system, as well as through the trainer's manual and the condition book. The Commission also restated that split sample testing for TCO_2 must be done at the same time the original sample is drawn and analyzed at the same time by the same piece of equipment for accurate results. Because TCO_2 deteriorates rapidly, it will not withstand storage for longer than 96-120 hours.[58]

67. While the comments made regarding the possible problems of implementing the proposed rule were insightful, the proposed language is nearly identical to existing rule language and therefore has a presumption of need and reasonableness. The appropriate time to object to the language would have been when Minn. R. 7890.0110, subpart 7, item E was proposed and open for comment. Based upon the rule record, the Administrative Law Judge finds that subpart 5a is needed and reasonable.

Repealer

68. Prior to adopting the proposed rules, the Administrative Law Judge recommends that the Commission consult with the Revisor of Statutes to add a Repealer to the end of the rules as it relates to the repeal of Minn. R. 7878.0120, subp. 4. This information appears to have been unintentionally omitted from the rule draft.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commission gave proper notice of the hearing in this matter.

2. The Commission has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

3. The Commission has demonstrated its statutory authority to adopt the proposed rule and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3, and 14.50 (i) and (ii).

4. The Commission has documented the need for and reasonableness of its proposed rule with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2, and 14.50 (iii).

5. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

[58] Commission Response dated January 13, 2009. T. at 14-15.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted.

Dated: February _17_, 2009.

/s/ Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Administrative Law Judge

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NOTICE

The Commission must make this Report available for review by anyone who wishes to review it for at least five working days before it may take any further action to adopt final rules or to modify or withdraw the proposed rules. If the Commission makes changes in the rules, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the Commission must submit this version to the Revisor of Statutes for a review as to its form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review the same and file them with the Secretary of State. When the final rules are filed with the Secretary of State, the Administrative Law Judge will notify the Commission, and the Commission will notify those persons who requested to be informed of their filing.